

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No. 605

JACOB SIEGEL COMPANY,

Petitioner,

v.

FEDERAL TRADE COMMISSION.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR AMICUS CURIAE

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BRIEF FOR AMICUS CURIAE

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

This brief is submitted on behalf of a group of retail stores which are outlets for petitioner's topcoats and overcoats sold under the trade name of "Alpacuna." They appear as *amicus curiae* in support of the petitioner's writ of certiorari which brings up for review the mandate of the Circuit Court, Third Circuit, affirming *in toto* a cease and desist order of the Federal Trade Commission. The opinion of the Court below is reported at 150 F. (2d) 751 (R. 891).

The stores which appear are: Arnold Constable & Company, Incorporated, New York City; A. H. Benoit & Company, Portland, Maine; The William H. Block Company, Indianapolis, Indiana; Gimbel Brothers, Philadel-

phia, Pa.; The Larkey Company, Inc., Newark, New Jersey; Metropolitan Company, Dayton, Ohio; Maurice L. Rothschild, Chicago, Ill.; Samter Bros. Co., Scranton, Pa.; Harry Suffrin, Detroit, Michigan.

The interest of *Amicus Curiae* herein was set forth in the opinion of the Circuit Court as follows:

"A group of retail stores who handle the 'Alpacuna' coats have filed a brief, as *amicus curiae* in support of the petitioner's stand. Those stores set out that they have a very definite interest in the retention of the name by reason of co-operation in extensive advertising and selling the product over a period of years and that the barring of the use of the name 'Alpacuna' is a matter of serious detriment and direct prejudice to them" (R. 895).

Amicus Curiae respectfully calls this Court's attention to the fact that over eighty retail stores throughout the country, in addition to those specifically included as *Amicus Curiae*, have indicated to us their great interest in the preservation of the trade name of "Alpacuna". They, too, would have a "very definite interest in the retention of the name" and the prohibition of its use would be "a matter of serious detriment and direct prejudice to them" as well.

Basis of Jurisdiction

Jurisdiction is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, 43 Stat. 938. The opinion of the Circuit Court of Appeals for the Third Circuit was filed November 30, 1944. A Petition for Rehearing was granted March 6, 1945, and the Court's original opinion confirmed in a final opinion filed September 20, 1945. An enforcement order

was entered October 9, 1945, and the enforcement thereof stayed to afford time for presentation of the issue to this Court. Certiorari was granted January 2, 1946.

Questions Presented

(1) Whether a Circuit Court of Appeals may modify an order of the Federal Trade Commission which it believes harsh and unreasonable, as was held proper in the case of *Federal Trade Commission v. Royal Milling Co.*, 288 U. S. 212 (1933), and in other decisions of this Court and of the various Circuit Courts.

(2) Whether this Court has the power, asserted in the *Royal Milling* case, to modify an order of the Federal Trade Commission which it believes harsh and unreasonable.

Specifications of Error

Amicus Curiae, joining with petitioner, urge the following errors:

(1) The Court below erred in holding that it does not have the power to modify a remedy prescribed in a Federal Trade Commission cease and desist order which the Court believes to be unnecessarily harsh, destructive and unreasonable.

(2) The Court below erred in failing to hold the order of the Federal Trade Commission unconstitutional, invalid and contrary to the purposes of the Federal Trade Commission Act insofar as it unreasonably and unnecessarily destroys a valuable trade name.

Summary of Argument

Amicus Curiae submit that, regardless of any interpretation of other Acts creating administrative agencies, the statutory history of the Federal Trade Commission Act establishes that Congress intended the orders of this Commission to be subject to review by a court having power to modify harsh and arbitrary orders. Prior to the amendment of the Federal Trade Commission Act in 1938, this Court in *Federal Trade Commission v. Royal Milling Co.*, 288 U. S. 212 and in *Federal Trade Commission v. Beech-Nut Packing Company*, 257 U. S. 441, 455-6 (1922) had held that the appellate courts had the power to modify punitive orders of the Federal Trade Commission. The Federal Trade Commission Act was reenacted in substantially identical form by Congress with full knowledge of these decisions and without any objection thereto by the Commission which had asked Congress to modify the Act in many other respects.

The Court below argued that, by implication from certain National Labor Relations Board cases in this Court, the *Royal Milling Company* case had, in effect, been overruled. Those cases, it is submitted, did not enunciate the hard and fast rule, such as the Circuit Court below appears to have found, that appellate tribunals reviewing an administrative order are powerless with respect to the remedy invoked by the agency. In fact, other Circuit Courts have, subsequent to the said National Labor Relations Board cases, found no such hard and fast rule, for they modified Federal Trade Commission orders where required to effectuate the purposes of the Act.

Moreover, this Court has held in a line of decisions that the enforcement of administrative decrees is subject to the application of the principles of equity. Orders that are punitive in nature and or too broad in scope will not

be enforced. As recently as December 10, 1945, this Court in *May Department Stores v. National Labor Relations Board* reiterated those principles. Those decisions require that the order of the Federal Trade Commission in the instant case compelling the discontinuance of the use of the established trade name "Alpacuna" must be modified in the manner suggested. The proposed modification is in accord with decisions of this Court and of the Circuit Courts and, *as the Court below found*, can easily be effected (R. 898).

Finally, it is submitted that the portion of the cease and desist order in issue herein is not justified, in its sweeping and punitive form, by the findings of the Commission or the evidence produced before the Commission upon the hearings in the case.

Preliminary Statement

The Circuit Court below, in its original opinion, and obviously against its inclination, stated that it felt constrained to follow the views of another Circuit as to the respective powers of the Commission and the Court. That other Circuit arrived at its own conclusion by an interpretation of Supreme Court decisions applying to another administrative agency.

Expressing dissatisfaction with that part of the Commission's order which destroyed petitioner's valuable trade name built up over a period of years and at tremendous expense, the Court below wrote:

"* * * we think strongly that the order is far too harsh." (R. 898)

Later the Court stated:

"* * * if we were still in control of the remedy we would modify the order as above indicated." (R. 902)

The Court further observed:

"The infraction, as the case now stands is slight and could be cured by simple and qualifying language." (R. 898)

And again, as though weighing possible injury to the "substantial portion of the purchasing public" as against destruction of this valuable trade name of the petition, the Court stated:

"It destroys a widely favorable known trade name in existence for 14 years. It causes serious injury to the petitioner and its retail outlets." (R. 898)

Notwithstanding its expressed disagreement with the extreme harshness and broad scope of the Federal Trade Commission order and of the rule of law enunciated, the Circuit Court below affirmed the Commission's order without modification and, upon rehearing, felt constrained to abide by that decision.

The Statute and Applicable Decisions

The relevant portions of the Act here involved are:

"(a) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.

.

"The Commission is hereby empowered and directed to prevent persons . . . or corporations . . . from using unfair methods of competition in commerce and unfair and deceptive acts or practices in commerce."

15 U. S. C. A. Sec. 45 (a):

52 Stat. 111, Sec. 5.

"(c) Any person, * * * or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the circuit court of appeals of the United States, * * * by filing in the court, * * * a written petition praying that the order of the Commission be set aside * * *. Upon such filing of the petition and transcript the court shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, evidence, and proceedings set forth in such transcript a decree affirming, *modifying* or setting aside the order of the Commission, and enforcing the same *to the extent* that such order is affirmed, * * *." (Italics ours.)

15 U. S. C. A. Sec. 45 (c);

52 Stat. 111, Sec. 5.

"(d) The jurisdiction of the circuit court of appeals of the United States to affirm, enforce, modify, or set aside orders of the Commission shall be exclusive."

15 U. S. C. A. Sec. 45 (d);

52 Stat. 111, Sec. 5.

It is respectfully submitted that the Circuit Court had the power under the Federal Trade Commission Act to enter the modification sought herein.

The last and leading case in this Court dealing with the power of a court to modify a Federal Trade Commission order is *Federal Trade Commission v. Royal Milling*

Co., 288 U. S. 212 (1933).^{*} Since that decision, no Federal Trade Commission case has been decided in the Supreme Court which deviates in any way from the rule enunciated therein. Furthermore, a study of the cases in the Supreme Court since that time reveals no opinion which has even distinguished or mentioned the *Royal Milling* case with disfavor.

Federal Trade Commission v. Royal Milling Co., *supra*, cited with approval cases arising in various Circuits in which orders of the Commission had been modified: *Fluegelman & Co. v. Federal Trade Commission*, 32 F. (2d) 59 (C. C. A. 2nd 1930); *Federal Trade Commission v. Cassoff*, 38 F. (2d) 790 (C. C. A. 2nd 1930); *Federal Trade Commission v. Good Grape Co.*, 45 F. (2d) 70 (C. C. A. 6th 1930).

Thereafter, courts in every Circuit wherein similar cases arose applied the rule of modification established by the *Royal Milling Co.* case: *Federal Trade Commission v. Hires Turner Glass Co.*, 81 F. (2d) 362 (C. C. A. 3rd 1935); *Etalissements Regaud, Inc. v. Federal Trade Commission*, 125 F. (2d) 590 (C. C. A. 2d, 1942); *Bear Mill Mfg. Co. Inc. v. Federal Trade Commission*, 98 F. (2d), 67 (C. C. A. 2d 1938); *Federal Trade Commission v. Midwest Mills, Inc.*, 90 F. (2d), 723 (C. C. A. 7th 1937).

Suddenly and without any previous indication, in 1944, one Circuit^{**} announced itself powerless to follow the

^{*} *The Royal Milling Co.* case was preceded by the opinion of this Court in *Federal Trade Commission v. Beech-Nut Packing Company*, 257 U. S. 441 (1922) wherein an order of the Federal Trade Commission, set aside by the Circuit Court below, was reinstated but as modified (pp. 455-456) upon the ground that the order was "too broad". This Court remanded to the Circuit Court below, with instructions to enter judgment limiting the cease and desist order to certain specific practices.

^{**} Exemplified by *Herzfeld v. Federal Trade Commission*, 140 F. (2d) 207 (C. C. A. 2d 1944).

Royal Miling case any longer despite the fact that this court had never itself taken that position. This unwarranted and unwise departure has not been followed in other Circuits in Federal Trade Commission cases.

Thus, in the Ninth Circuit, in *Ultra Violet v. Federal Trade Commission*, 143 F. (2d) 814 (C. C. A. 9th 1944), the court, although finding that the Commission's order was based on substantial evidence, refused to enforce a portion of it on the ground that it was too broad and **unfair to the petitioner**. It further modified the order as requested to eliminate the over-reaching effect of the prohibition on petitioner's advertising in one particular. It is significant to note that the Federal Trade Commission failed to apply for a writ of certiorari in that case but now maintains, in the case at bar, that there is no power in this court to modify.

The self-limitation of the Second Circuit upon its power to modify decisions of the Federal Trade Commission mentioned above was apparently based on its own interpretation of certain decisions under the National Labor Relations Act.* However, in 1942, one or two years after these same National Labor Relations Board cases had been determined by this Court, the Seventh Circuit in a Federal Trade Commission case modified an order of the Commission on the ground that it was unreasonable and "would serve no purpose in the protection of the public, but might limit petitioner in truthfully representing its product." The dissenting opinion in the case particularly demonstrates that the decision is one where the court disagrees with the Commission as to the nature and extent of the order required to remedy the evil complained of. Yet the majority feels free to modify in accordance with its own views.

*The *Herzfeld* case cited as its first two authorities: *International Assn. of Machinists v. National Labor Relations Board*, 311 U. S. 72 (1940) and *Phelps-Dodge Corp. v. National Labor Relations Board*, 313 U. S. 177 (1941).

D. D. D. Corp. v. Federal Trade Commission, 125 F. (2d) 679 (C. C. A. 7th 1942).

Again, the Commission failed to apply for a writ of certiorari to this court.

Also in 1942, two years after the above labor cases were decided, the Ninth Circuit in *Lee Boyer's Candy v. Federal Trade Commission*, 128 F. (2d) 261 (C. C. A. 9th 1942), modified an order of the Federal Trade Commission. The Commission's order forbade petitioner from distributing merchandise so packed and assembled that sales of it to the public "are to be made or may be made by means of a game of chance, gift enterprise or lottery scheme." The court expunged the words "may be made" on the ground that the order thus written was too broad.

It is interesting to note that the Commission in that case, on page 11 of its brief, argued:

"The Commission is entitled to enter an order broad enough to prevent evasion."

Further, on page 15 of its brief, it protested:

"Such an order will in every sense afford petitioner as much protection as would a modified order to cease and desist at the same time avoiding a modification which will have the effect of leaving a loop-hole for evasion which is certainly closed and no more than closed by the use of the words in controversy."

Yet the court, following its previous decision in *Ardelle Inc. v. Federal Trade Commission*, 101 F. (2d) 718 (C. C. A. 9th 1939) and, rejecting decisions of other courts which affirmed identical orders of the Commission without modification, modified the order as indicated above. Despite its strong protest in the Circuit Court the Federal Trade

Commission failed to petition this court for a writ of certiorari.

It thus appears that the Seventh and Ninth Circuits still feel free to modify Federal Trade Commission orders when the occasion warrants. Moreover, even in the Second Circuit where the rule has been laid down which in effect makes the appellate courts powerless to modify the remedy as decreed by the Federal Trade Commission, there is a good deal of confusion, if not outright disagreement, among the judges themselves.

For instance, in *Gelb v. Federal Trade Commission*, 144 F. (2d) 580 (C. C. A. 2nd 1944), the Commission had issued a cease and desist order, part of which prohibited petitioner from representing that his preparation reconditioned the hair. The court stated that the Commission had found that the preparation in question was incapable of performing this function. Nevertheless, the court modified the order so as to permit the petitioner to employ the phrase "recondition the hair." The majority attempted to make it appear that the modification was based upon a lack of substantial evidence with regard to the particular in question. However, a reading of the most vigorous dissent by Judge Clark in that case reveals that he regards the majority opinion as being in contravention of the "no power" rule adopted in 1944. Judge Clark's precise, emphatic words were:

"Hence, even if we had control over the Commission's choice of remedy, I should think it quite a mistake to exercise it here. But we have protested most strongly and steadily recently that we have no such control. *Herzfeld v. Federal Trade Commission*, 2 Cir., 140 F. 2d, 207; *Parke, Austin & Lipscomb v. Federal Trade Comm.*, 2 Cir., 142 F. 2d, 437; *Charles of the Ritz Distributors Corp. v. Federal Trade Comm.*, *supra*."

It is significant to note that Judge Clark* wrote the majority opinion in the *Charles of the Ritz* case* and concurred in the *Parke, Austin & Lipscomb* case,** both of which followed the *Herzfeld* rule.

Thus, it becomes clear that in this one Circuit, which has refused in Federal Trade Commission cases to follow the *Royal Milling* decision, there is confusion and even disagreement in the court itself.

A fair analysis of the *Gelb* decision leads to the conclusion that the Second Circuit, which has in words enunciated the *Herzfeld* doctrine, in action will modify an order of the Commission when it disagrees strongly enough with it.

Statutory Construction

When recourse is had to the statute itself which governs the relationship between Court and Commission, the right of the court to modify the Commission's orders would appear clear.

Section 5 of the Federal Trade Commission Act states that the jurisdiction of the Circuit Court of Appeals to modify orders of the Commission shall be exclusive and that the Court shall have the power to make and enter upon the pleadings a decree modifying the order of the Commission.

"To modify" has been defined in Funk & Wagnall's Standard Dictionary as:

"1. To make somewhat different; change more or less in character, properties, form or application; limit or restrict; vary; as to modify the details of a plan. 2. To make more moderate or less

* 143 F. (2d) 676 (C. C. A. 2d 1944).

** 142 F. (2d) 437 (C. C. A. 2d 1944).

sweeping; reduce in degree or extent; qualify; as to modify a punishment."

The original Act creating the Federal Trade Commission was adopted in 1914. That Act was not substantially amended or changed in any respect until 1938 when, after careful consideration of various decisions which had been handed down by this Court and various Circuit Courts in the intervening period, and upon request of the Federal Trade Commission, the Act was substantially amended to strengthen and enlarge the jurisdiction of the Federal Trade Commission and to include provisions relating to the finality of the Federal Trade Commission orders. The amending statute, introduced in the United States Senate, was reported by the Committee on Interstate Commerce to the 75th Congress, First Session.* That report contained a letter from the Acting Chairman of the Federal Trade Commission, dated February 11, 1936, discussing at length the proposed amendments and particularly the amendments to Section 5 of the Federal Trade Commission Act. Reference is therein made to many decisions of this Court and of the Circuit Courts, but no reference whatsoever was therein made, nor any exception taken, to the existing decisions whereunder it had been held that the Circuit Court did have the power to modify orders of the Federal Trade Commission.**

* Senate Report No. 221, Vol. I, Senate Reports on Public Bills, etc./Serial No. 10076.

** Those existing decisions are exemplified, among others, by: *Federal Trade Commission v. Royal Milling Co.*, 288 U. S. 212 (1933); *Federal Trade Commission v. Beech-Nut Packing Company*, 257 U. S. 441 (1922); *Federal Trade Commission v. Hires Turner Glass Co.*, 81 F. (2d) 362 (C. C. A. 3rd, 1935); *Federal Trade Commission v. Good-Grape Co.*, 45 F. (2d) 790 (C. C. A. 6th, 1930); *Fluegelman v. Federal Trade Commission*, 32 F. (2d) 59 (C. C. A. 2nd, 1930).

The Act, as finally adopted after conference report of the two Houses of Congress, is of exceptional significance in that Congress *specifically retained* the power in the Circuit Court to modify orders of the Federal Trade Commission. In columnar form, we set forth below excerpts from the Act, more particularly portions of Section 5 thereof, as the same existed prior to the amendment in 1938 and as the same read after the 1938 statute.

38 Stat. 719.

Sec. 5 (p. 720)

... Any part required by such order of the commission to cease and desist from using such method of competition may obtain a review of such order in said circuit court of appeals by filing in the court a written petition praying that the order of the commission be set aside. A copy of such petition shall be forthwith served upon the commission, and thereupon the commission forthwith shall certify and file in the court a transcript of the record as hereinbefore provided. Upon the filing of the transcript *the court shall have the same jur-*

52 Stat. 111

Sec. 5(c).

“(c) Any person, * * * or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the circuit court of appeals of the United States, * * * by filing in the court, * * * a written petition praying that the order of the Commission be set aside * * *. Upon such filing of the petition and transcript *the court shall have jurisdiction* of the proceeding and of the question determined therein, *and shall have power to make and enter upon the pleadings, evidence, and proceed-*

isdiction to affirm, set aside, or modify the order of the commission as in the case of an application by the commission for the enforcement of its order, *and the findings of the commission as to the facts, if supported by testimony, shall in like manner be conclusive.*

"The jurisdiction of the circuit court of appeals of the United States to enforce, set aside, or modify orders of the commission shall be exclusive."

ings set forth in such transcript a decree affirming, modifying or setting aside the order of the Commission, and enforcing the same to the extent that such order is affirmed. * * *

"(d) The jurisdiction of the circuit court of appeals of the United States to affirm, enforce, modify, or set aside orders of the Commission shall be exclusive."

Here, then, is an amendment to the Act expressly recognizing and reenacting the Court's power of modification.

It is a well-recognized rule of statutory construction that, where a legislature enacts a statute amending an existing law, it is presumed to have been cognizant of judicial interpretations of that law. Any attempted alteration of judicial construction of the prior law must be expressed in clear and appropriate language, otherwise the statute will continue to be interpreted as theretofore by the Courts.

Johnson v. Manhattan Ry. Co., 289 U. S. 479, 500 (1933);

Hecht v. Malley, 265 U. S. 144, 153 (1924);

Heald v. District of Columbia, 254 U. S. 20 (1920);

Louisville Cement Co. v. Interstate Commerce Commission, 246 U. S. 638, 644 (1917);
Latimer v. U. S., 223 U. S. 541 (1912);
Commissioner of Internal Revenue v. F. G. Bouffits Trust, 115 F. (2nd) 788, 792 (C. C. A. 10th, 1940).

Moreover, it is a basic rule of statutory construction that each word in a statute must be given its full significance.

U. S. v. Lexington Mill Co., 232 U. S. 399 (1913);
Washington Market Co. v. Hoffman, 101 U. S. 112 (1879).

The *Royal Milling* case was the supreme law of the land at the time of the enactment of the 1938 Wheeler-Lea Amendment to the Federal Trade Commission Act: Its doctrine was being followed by the various circuits.*

Had the legislature intended to circumscribe the power of the court to modify orders of the Commission, it would have used appropriate language to that end. It is presumed to have acted with knowledge of those decisions and their effect. However, rather than limiting the powers of the Court the legislature utilized language which clearly comprehended the Court's powers and manifestly extended them for future application.

It is, therefore, respectfully submitted that an analysis of the *Royal Milling* case and the decisions in the various Circuits following thereupon as well as the Federal Trade Commission Act itself, and as amended, establishes the proposition that the Circuit Court has the power to modify the instant order in the manner contended for herein.

* *Federal Trade Commission v. Hires Turner Glass Co.*, 81 F. (2d) 362 (C. C. A. 3rd, 1935); *Federal Trade Commission v. Midwest Mills, Inc.*, 90 F. (2d) 723 (C. C. A. 7th, 1937); *Fluegelman v. Federal Trade Commission*, 32 F. (2d) 59 (C. C. A. 2nd, 1930).

The Power of Appellate Courts Over Punitive Orders

It is not inappropriate at this point to consider, in connection with the problem of the Court's power of modification of the Commission's order, the power resident in the Court itself. In a very recent case in this Court* Mr. Justice Reed, speaking for the Court, discussed this problem with reference to the judicial power over orders of the National Labor Relations Board. By way of analogy, Mr. Justice Reed, discussing the scope of administrative orders and the question of judicial review, wrote:

"Equity has long been accustomed in other fields to reach conclusions as to the scope of orders which are necessary to prevent interference with the rights of those who seek the court's protection."

An enforcement proceeding of the type sought herein by the Commission is comparable to a proceeding in equity and in which the principles of equity must be applied.

National Labor Relations Board v. Express Publishing Co., 312 U. S. 426 (1941);

U. S. v. Morgan, 307 U. S. 183, 191 (1939);

Ford Motor Co. v. National Labor Relations Board, 305 U. S. 364, 373 (1938).

It has been uniformly stated that the functions of administrative orders is remedial and not punitive.

Republic Steel Corp. v. National Labor Relations Board, 311 U. S. 7 (1940);

Consolidated Edison v. National Labor Relations Board, 305 U. S. 197 (1938).

Cases involving the Court's power of review of the remedy in National Labor Relations Board cases are

* *May Department Stores v. National Labor Relations Board*, 14 U. S. L. W. 4042, 4045 (decided Dec. 10, 1945).

treated specifically at this point in view of the fact that the Second Circuit rule of "no power" in Federal Trade Commission cases is based upon labor decisions. The fact, however, is that this Court has itself enunciated and applied the principles of equity hereinabove stated to labor cases. Modification of National Labor Relations Board orders has been effected by the courts in two outstanding types of cases. These cases involved (1) re-instatement of employees, (2) back-pay to employees. In both instances the court has stressed the principle that affirmative action ordered by the Board must be designed to effectuate the purposes of the Act and that its orders must be remedial rather than punitive. Recent decisions of this Court on this subject in which orders were modified are:

Southern Steamship Co. v. N. L. R. B., 316 U. S. 31 (1942);

Republic Steel Corp. v. N. L. R. B., 311 U. S. 7 (1940);

N. L. R. B. v. Fansteel Metallurgical Corp., 306 U. S. 240, 257 (1930).

The Court below appears to have placed great reliance upon a certain footnote in the opinion of this Court in *Medo Photo Supply Corporation v. National Labor Relations Board*, 321 U. S. 678 (1944), which appears at the bottom of pages 681-682. In effect, however, this footnote does no more than to reaffirm the well-established and accepted rule that the finding of fact of an administrative agency will not be upset if supported by substantial evidence and that the question of weighing the value of testimony and determining the inferences to be drawn therefrom must rest with the administrative body. In no sense can this footnote be deemed to represent a departure by this Court from those equitable considerations governing judicial review of administrative orders as hereinabove enunciated. Quite to the contrary, the most recent expression of this Court in *May Department Stores v. National*

Labor Relations Board (decided December 10, 1945), 14 U. S. L. W. 4042, clearly reaffirms these principles. Mr. Justice Reed stated:

"The test of the proper scope of a cease and desist order is whether the Board might have reasonably concluded from the evidence that such an order was necessary to prevent the employer before it 'from engaging in any unfair labor practice affecting commerce.' Section 10(a). Equity has long been accustomed in other fields to reach conclusions as to the scope of orders which are necessary to prevent interferences with the rights of those who seek the court's protection. Injunctions in broad terms are granted even in acts of the widest content, when the court deems them essential to accomplish the purposes of the act. We think that the Board has the same power to determine the needed scope of cease and desist orders under the National Labor Relations Act that courts have, when authorized to issue injunctions, in other litigation.

"That power of the Board is subject to review under Section 10. While the Board has been delegated initially the exclusive authority to prevent unfair labor practices, courts, which are called upon to enforce such orders by their own decrees, may examine its scope to see whether on the evidence they go so beyond the authority of the Board as to require modification as a matter of law before enforcement. Section 10(a) and (c). *The Express Publishing Company* case declared:

'To justify an order restraining other violations it must appear that they bear some resemblance to that which the employer has committed or that danger of their commission in the future is to be anticipated from the course of his conduct in the past.' (p. 437)

"We think that, in the circumstances of this proceeding, although there is a violation of Section 8 (1) as well as 8 (5), the violation of 8 (1) is so intertwined with the refusal to bargain with a unit asserted to be certified improperly that without a clear determination by the Board of an attitude of opposition to the purposes of the Act, to protect the rights of employees generally, the decree need not enjoin Company actions which are not determined by the Board to be so motivated."

The dissents in the *Southern S. S.* and *Faustel* cases, *supra*, pointedly decried the majority's unjustifiable interference with the "discretion" Congress had vested in the administrative agency. The rationale of these decisions must lie in the rule that while the court may be restricted in its control over the orders of the Labor Board, yet the Board itself is circumscribed in that its orders must effectuate the purposes of the Act and be remedial rather than punitive in nature.

The stated purposes of the Federal Trade Commission Act are to prevent unfair competition and deceptive acts in commerce.* These are not accomplished by the destruction of the business or property of an alleged violator. Its purposes would be effectuated by the removal of the misimpression or deception to the public. The result sought to be accomplished should be to protect the public to the utmost while, at the same time, injuring the charged party only insofar as absolutely necessary. Any other result would be punitive rather than remedial. It

* In an effort to determine impartially whether there was anything unfair or deceptive in the use of the trade name "Alpacuna", in that the coat contained no vicuna, a New York department store conducted a poll of over 200 customers chosen at random. Not one of them declared that the name "Alpacuna" indicated a vicuna content (see R. 893, Circuit Court opinion). In fact, not one single person even mentioned the rare and almost extinct animal vicuna.

might well be that the deception, in the instant case, could be removed by a cease and desist order against the petitioner continuing in business. This would, of course, protect the public fully. On the other hand, the purposes of the Act would not be effectuated. The Act does not encourage the destruction of a business, trade name or other property right. It does demand the outlawing of unfair trade practices and deception to the public.

In *Federal Trade Commission v. Royal Milling Company*, 288 U. S. 212, this Court, although sustaining the findings, modified the order and wrote:

"... we think under the circumstances the commission went too far in ordering what amounts to a suppression of the trade names. These names have been long in use, in one instance beginning as early as 1902. They constitute valuable business assets in the nature of good will, the destruction of which probably would be highly injurious and should not be ordered if less drastic means would accomplish the same result. The orders should go no further than is reasonably necessary to correct the evil and preserve the rights of competitors and public; and this can be done, in the respect under consideration, by requiring proper qualifying words to be used in immediate connection with the names." (p. 215)

In *Federal Trade Commission v. Eastman Kodak Co.*, 274 U. S. 619 (1927), we find this Court declaring itself on the limits of effectuating the purposes of the Federal Trade Commission Act by refusing to affirm an order of the Federal Trade Commission ordering defendant to dispose of two plants which were employed as part of a scheme to monopolize the film trade.

In *WOKO, Incorporated v. Federal Communications Commission* (C. A., D. C., decided January 21, 1946) the Federal Communications Commission, upon the hearing of an application for the renewal of the license of Station

WOKO, found as a fact that there had been a misrepresentation in the application to it and to its predecessor agency with respect to the beneficial ownership of a portion of the stock of the owning corporation. The Commission thereby concluded that the appellant "cannot be entrusted with the responsibilities of a licensee" and made the following express finding:

"The Commission, therefore, finds that a grant of the application for renewal of the license for the operation of WOKO by the appellant corporation would not serve public interest, convenience, or necessity and therefore should be denied."

The Court of Appeals for the District of Columbia reversed the order of the Federal Communications Commission. Discussing the provisions of that Act and the power of the Commission, the Court wrote:

"This limitation of judicial review of decisions of the appellee is consistent with the general body of law concerning the finality of administrative proceedings. The Congress of the United States, which has plenary power to regulate the radio industry, has designated the Commission as its administrative agent, because it desired to have the regulatory work done by technically trained experts, skilled and experienced in the technical duties of radio regulation. The Congress defined the scope of the authority of its agent or, as is sometimes said, it established the standard according to which the agent should act. The broad scope of authority, or standard of action, established by the Communications Act is that public interest, convenience and necessity must be served. Within that framework the administrative agent is free to exercise its expert judgment; it cannot act unconstitutionally, for neither could its principal, the Congress, and the

stream cannot rise higher than the source; it must proceed within the scope of the authority granted to it, that is to say, it must observe the standard established; *and it cannot act arbitrarily or capriciously.*" (Italics ours)

The opinion concludes with the following:

"Under the situation disclosed here, we conclude that the Commission acted arbitrarily in proceeding from its warranted conclusion that the stock ownership had been misrepresented to it, to the drastic decision that the continuance of the license would not be in the public interest, with the concomitant results of disestablishing an established satisfactory radio station and of imposing upon its corporate owner the entire loss of its good will and the serious impairment of the value of its capital assets."

In the *Woko* case, the Court of Appeals refused to allow the Federal Communications Commission to deny the application for license renewal because of the necessary resulting loss of good will and the serious impairment of the value of petitioner's capital assets. The Court took this step even though it meant the complete reversal of the Commission's order—this in spite of the fact that the petitioner had, through its representatives, falsified its reports for years and deceived the Commission. In the case at bar, the petitioner's request would only require a modification and not a reversal of the Commission's order and would fall within this Court's very ruling in the *Royal Milling* case that it would not countenance the elimination of trade names which constituted "valuable business assets in the nature of good will, the destruction of which probably would be highly injurious and should not be ordered if less drastic means will accomplish the same result" (p. 217).

The name "Alpacuna" had been the trade name of petitioner for more than thirteen years. Petitioner was the originator of this type of garment. It was conceded throughout the hearing that Jacob Siegel Company manufactured a fine product and was a reputable concern. As a matter of fact, a representative of the Better Business Bureau, testifying for the Commission, admitted that it had never received any complaint respecting the name "Alpacuna" (R. 40a) although it was widely advertised and nationally known.

The stores in whose behalf this brief is being filed, as well as other retailers selling this coat, running into the hundreds, have expended large sums of money in popularizing the name "Alpacuna". The Jacob Siegel Company itself has spent hundreds of thousands of dollars advertising the coat (R. 45a), and has built it up to a point where it is one of the largest trade name coats in the United States (R. 45a). The Commission's order depriving the Jacob Siegel Company and ultimately its distributing outlets from the use of this name in which they have a genuine equity and valuable good will clearly violates the holding, language and spirit of the cases cited above.

In the case at bar, with the removal of any possible misinterpretation by the public as to "Alpacuna" signifying a vicuna content, the further elimination of the trade name itself could serve no useful purpose at all to the public.* Examination of the order of the Federal

* Quite to the contrary, affirmance of this order will best serve all of the petitioner's imitators, users of the "cuna" or "ana" suffix, of which there are at least sixty-two (R. 305, 639(a), 640(a)). In passing, it will be noted that the Court in *Federal Trade Commission v. Good-Grape Company*, 45 F. 2d 70 (C. C. A. 6th 1930) mentioned the fact that respondent in that case might be placed upon an unequal footing with other soft drink or soda water manufacturers who were permitted to apply to their products the names of a fruit or some variety thereof indicative of flavoring only rather than of a claim that the beverage was in fact produced from the fruit.

Trade Commission in the instant case demonstrates that the Commission has arrived at a punitive rather than a remedial result, warranting the court's review and modification. Petitioner desires to clarify any misimpression on the part of purchasing public regarding vicuña as one of the ingredient fibres in its coats. To do this it has volunteered to add the phrase "Contains No Vicuña" in a prominent manner and sub-joining the trade name "Alpacuña". As a matter of fact, petitioner has already put this into effect and this court's attention is respectfully called to the labels which are affixed to the petitioner's brief.

Here, then, is a method for destroying the misimpression and at the same time preserving the trade name. A method which remedies the wrong without needless punishment. Here is a method which effectuates the *purposes of the Act* by removing the sole alleged deception without depriving the petitioner and *Amicus Curiae* of the good will in this valuable trade name, built up over a period of years and at great expense.

The power of the court to modify the Commission's order, to deal equitably and effectively with the infraction in the instant case, stems from judicial decision and legislative enactment. The *Royal Milling* case is clear. The Act gives the court power to modify. "To modify" in the Act must mean more than innocuous modification, more than a mere grammatical or semantic alteration or rearrangement of the Commission's orders. There is no need for the institution of judicial review to fall into disrepute. Appellate judges need not confine themselves to "passive obedience" to administrative dictates.* The exercise of conscience and intelligence in any given situation requires the court to do more than merely stamp its blanket imprimatur upon any administrative order which comes before it for review.

* See, Roscoe Pound, *Administrative Law and the Courts*, 24 Boston U. L. Rev. 201 (1944).

Moreover, even assuming the interpretation of the Second Circuit as to the restraining rule of National Labor Relation Board cases, it does not follow that such decisions would or should automatically be applied to Federal Trade Commission cases. One prominent writer concluding a thesis on judicial supervision over administrative agencies has stated:

"The approach suggested is a flexible doctrine of judicial review, the extent of which will vary from one agency to another dependent upon the function, exercise and the character of the individual and social interest involved, and will change in respect to a particular agency as the circumstances change."

Warner, *An Approach to the Extent of Judicial Supervision Over Administrative Agencies*, 28 Geo. L. J. 1042, 1073 (1940).

One difference between the effect of N. L. R. B. orders banning unfair labor practices and F. T. C. orders banning the use of trade names is evident. An "unfair labor practice" is an excrescence. It is not part and parcel of a business. Its employment may lead to additional profits or may satisfy the inexorable whims or prejudices of an employer. But it is not that factor upon which a business is based. It can, therefore, be done away with without affecting the continuation of the business.

On the other hand, "Alpacuma", the trade name, is a vital part of the business itself. The two are almost inseparable. It is without economic realization to argue that petitioner's goods could be sold under another name. The same argument could be offered if the business were confiscated and the petitioner told that he still had the name and could therefore start a new business. The banning of a trade name assumes much more of a punitive aspect than would the barring of an unfair labor practice or the ordering of a defendant to deal with a particular union.

Consequently, prohibiting the use of a trade name immediately poses the question of "effectuation of the policy of the Act" just as would destruction of the business itself. The court has the right, the duty in fact, to remove the punitive effect of an order and to modify it so that it becomes remedial. This can be done in the instant case by modifying the order so as to permit the petitioner to use the trade name "Alpacuna" with the qualifying phrase "Contains No Vienna".

The difference between the two agencies and the statutes creating them has in other circumstances been recognized.

International Mine Workers v. Eagle Picher Mining & Smelting Co., 325 U. S. 335 (1945);

American Chain & Cable Co., Inc. v. Federal Trade Commission, 142 F. (2d) 909 (C. C. A. 4th, 1944);

National Labor Relations Board v. National Motor Bearing Co., 105 F. (2d) 652, 661 (C. C. A. 9th, 1939).*

In view of the vast difference between the two agencies, their legislative history and judicial treatment, between the policies giving rise to their establishment and the possible effects of their decrees upon business, and in view of the previous recognition by this and other courts of those distinctions, there exists no reason to conclude that decisions under the National Labor Relations Act are necessarily and automatically determinative of the power of the court to modify orders of the Federal Trade Commission.

* The difference between the Federal Trade Commission and other agencies has also been recognized: Stern, Review of Findings of Administrators, Judges and Juries: A Comparative Analysis, 58 Harvard Law Review 70; McFarland, Judicial Control of the F. T. C. and the Interstate Commerce Commission (1933); Paul, *Dobson v. Commissioner: The Strange Ways of Law and Fact*, 57 Harvard Law Review 753, 761 (note 33), 766 (note 48); *F. T. C. v. Curtis Publishing Co.*, 260 U. S. 568, 580 (1923).

If there is one fact in this case that stands out above all, it is clear, and the Circuit Court so states, that the findings of fact made by the Commission can be translated effectively and equitably through a modified order giving consideration to the business interests of the petitioner and of *Amicus Curiae*, without in any sense being in derogation of the public interest.

No Contradiction by Qualifying Language

The Commission's argument that qualifying language cannot be used to contradict a trade name has no merit here. The word "Alpacuna" being meaningless* its contradiction would have to be meaningless. Herein lies the distinction between the case at bar and *Federal Trade Commission v. Algoma Lumber Co.*, 291 U. S. 67 (1934). In the latter case, the word at issue was "white", a word of definite meaning. In our case, "Alpacuna", lacking any meaning cannot be contradicted by a phrase which does have meaning.

The argument of the Commission against the use of any explanatory phrase for the alleged reason that it could not eradicate the purported deception runs counter to the decisions in *Federal Trade Commission v. Good-Grape Company*, 45 F. (2d) 70 (C. C. A. 6th 1930):

* It is the contention of the Commission that the "cuna" portion of "Alpacuna" signifies a vicuna content. As a matter of fact, the uncontradicted evidence as to the derivation of the name "Alpacuna" shows that the proper suffix is "una" and not "cuna". Even assuming the Commission's theory, "cuna" has no English meaning except to indicate a member of an obscure Indian tribe (Trial Examiner's Report, 11a). It has been administratively declared that the "cuna" type trade name is "arbitrary and meaningless." (See remarks of Asst Commissioner of Patents in *New York Knitting Mills, Incorporated v. Gotham Knitting Mills, Incorporated*, 37 U. S. Patent Quarterly, p. 459 (1938); *New York Knitting Mills, Incorporated v. Rosenna Knitted Sportswear*, 37 U. S. Patent Quarterly, p. 460 (1938).) Cf. remarks of witness Richardson (R. 472a) who said that "una" in "Alpacuna" was as meaningless as "ena" in Wheaten.

Federal Trade Commission v. Cassoff, 38 F. (2d) 790 (C. C. A. 2nd 1930) and *N. Fluegelman & Co. Inc. v. Federal Trade Commission*, 37 F. (2d) 59 (C. C. A. 2nd 1930), all of which were cited with specific approval by this Court in *Federal Trade Commission v. Royal Milling Co.*, 288 U. S. 212.

Those cases and the case at bar are dissimilar from the "Havana Cigar" case (*H. N. Heuser & Son v. Federal Trade Commission*, 106 F. (2d) 596 (C. C. A. 3d, 1939) and the "Duraleather" case (*Masland Duraleather Company v. Federal Trade Commission*, 34 (2d) 733 (C. C. A. 3d, 1929)). These two latter decisions fall into the type represented by and most ably analyzed in *Federal Trade Commission v. Army & Navy Trading Co.*, 88 F. (2d) 776, 779-780 (C. C. A., D. C., 1937). The Court in that decision drew a distinction between the facts involved in the "Havana Cigar" and "Duraleather" cases, and the facts involved in the *Royal Milling Company*, the *Fluegelman*, the *Good-Grape* and the *Cassoff* cases. Analyzing the last four mentioned cases, the Court expressed most aptly the basis for these holdings as follows:

"But it will be noted that in these cases the selection of qualifying words effective to eliminate deception was feasible because the names involved made separate and distinct representations in respect of the origin and characteristics of single products, some of which representations were true and some of which were untrue. Thus in Federal Trade Commission v. Royal Milling Co., the representation of the word 'Milling' as to mixing and blending of the flour was true, but the representation as to the origin of the flour, i.e., as to by whom it was ground, was untrue. In N. Fluegelman & Co. v. Federal Trade Commission, the representation of the words 'Satinmaid' and 'Satinized' that the fabric had a satin weave was true, but the representation that it had a silk content was not. In

Federal Trade Commission v. Good-Grape Co., the representation of the phrases 'Good-Grape' and 'Fruit of the Vine' that the product was like grape juice in color and flavor was true but the representation that it was made of natural grape juice was untrue. In Federal Trade Commission v. Cassoff, the representation of the phrases 'White Shellac' and 'Orange Shellac' that the product was composed solely of genuine shellac gum dissolved in alcohol was untrue, but the representation that it was like shellac, or that it could be used for the purpose of shellac, was true. *Therefore, qualifying words could be chosen which would eliminate any deceptive representations and leave standing the truthful ones alone.* Thus in Federal Trade Commission v. Royal Milling Co., the qualifying words 'Not Grinders of Wheat' indicated definitely that the grain from which the flour is made did not originate with, i.e., was not ground by, the Royal Milling Company, but left standing the representation that the flour was mixed and blended by that Company; *and in the other three cases, the qualifying words clearly eliminated the deceptive representations of what the characteristics of the products were not, but left standing the true representations as to what the characteristics were.*" (Italics ours.)

This applies equally as well to the instant case. The "Alpacuna" coat has a substantial alpaca fiber content. It has, moreover, a vicuna finish.* The only possible contention of falsity with respect to the name "Alpacuna",

* The Trial Examiner himself stated that he believed "any association with name 'Alpacuna' represents a finish" (R. 420) and numerous witnesses testified that vicuna meant a finish (R. 415a, 417a, 426a, 433a, 497a, 538a, 561a).

and more particularly to the "vicuna", lies in the contention that it may, by a far-fetched and unreasonable interpretation, imply an actual vicuna fiber content. Certainly any such possible impression can easily and quickly be eliminated by proper qualifying words, removing the alleged deceptive portion and leaving that which is admittedly truthful.

In concluding the discussion and analysis of those cases applicable to the validity of the within order in so far as it completely prohibits the use of the trade name "Alpacuna", it is respectfully suggested that the facts in the case at bar justify a modification of the Commission's order far more than in any case cited above. In the *Royal Milling* case, the word "Mill" was actually used. In the *Good-Grape Company* case, while the product con-

* The Commission alleged that a substantial portion of the purchasing public was given the impression that the garment contains vicuna. As a matter of fact, the vicuna is undisputably a rare and almost extinct undomesticated South American animal (R. 176a). To obtain the animal's hair it is necessary to kill it. Such slaughter is strictly regulated by the Government of Peru, the animal's habitat. The vicuna is so rare that the National Zoo in Washington once had a pair which died in 1918 and 1920 and, at the time of the hearings, the Zoo had been unsuccessful in replacing them (R. 188a). A representative of that Zoo testified that the vicuna was the rarest animal in captivity (R. 189a). Its pictures are not to be found in textbooks (R. 175a). According to a booklet of the United States Department of Commerce, the last importation of vicuna was only two thousand pounds, a two year's supply (R. 241a). This is to be compared with the importation of millions of pounds of other types of fibres (R. 541a).

Vicuna fibre is not a commercial product (R. 387a). It is very perishable (R. 402a). Even in normal times it is not offered in the open market (Trial Examiner's Report, p. 12a).

Vicuna coats are priced as high as \$900 (R. 34a), and not more than five or six such coats are made in the United States in a year or two (Trial Examiner's Report, p. 13a). This is to be compared with the "Alpacuna" coat which retails at about \$40 and which is one of the largest selling coats in the United States (R. 45a).

tained no grape or grape-juice, nevertheless, the use of the words "grape" or "fruit of the vine" was permitted. In the *Cassoff* case, "shellac" was specifically used, and in the *Fluegelman* case "satin" actually was a part of the trade name.

In the case at bar, however, the word "vicuña" does not appear as such in the trade name. It is merely contended that "cuna" as part of "Alpacuna" implies to the public the presence of vicuña. Administrative authority has declared "cuna" to be meaningless (*supra*, p. 28 fn.) and, in fact, an assumption that "Alpacuna" was derived from "cuna" is contrary to the uncontradicted evidence in the record as to the derivation of the name.

Certainly, in a situation of this type, where deception to the public can only be claimed by questionable interpretation of and reading a meaning into a trade name, there is even more reason why that trade name, a valuable business assets developed over a period of years, should not be destroyed when less drastic means could clearly accomplish the same result.

This case above all cases is one where, in the words of this Court in *Federal Trade Commission v. Royal Milling Company*, 282 U. S. 212, the evil, if any, could be corrected and the rights of the public protected by allowing the continued use of the trade name with proper qualification.

The Commission's Order is Not Justified by the Evidence

Entirely apart from any question of control over the remedy by the court, as such, *Amicus Curiae* respectfully submits that the order in the instant case should have been modified because it goes beyond the findings of fact and substantial evidence in the case.

Paragraph Nine of the Commission's findings contains the basis for the Commission's present order:

"The Commission, therefore, find that the name 'Alpacuna' is misleading and deceptive to a substantial portion of the purchasing public *in that* it represents or implies to such persons that respondent's coats contain material which they do not in fact contain." (Italics ours)-(R. 652a)

That portion of the Commission's order which is in issue on this rehearing prohibits:

"Using the word 'Alpacuna' or any other word which in whole or in part is indicative of 'vicuña' to designate or describe respondent's coats: . . ."
(R. 655a).

The order transcends the findings of fact and the substantial evidence in the record in that it completely bars the use of "Alpacuna", whereas the evidence below merely shows that "Alpacuna" *standing alone* is allegedly deceptive to a substantial portion of the purchasing public. In fact, the record is even more narrowly restrictive and affirmatively demonstrates through the Commission's own witnesses that a statement or explanation to the public that "vicuña" is not contained in the garments completely removes any possible misapprehension. An order prohibiting the use of "Alpacuna" *unless accompanied by qualifying phrase clearly indicating a lack of vicuña content* would thus conform both to the findings of fact and to the evidence in the case.

A striking example of the type of evidence adduced at the hearing sustaining the above contention appears in the testimony of Robert L. Cohen, a Commission witness, on cross-examination:

"A. And I would judge from that that it is alpaca and vicuña hair, with a cotton backing.

Q. Until you read the next sentence. Read that sentence. A. 'Alpacuna' is a registered trade name

and is composed of alpaca, wool, and mohair pile on cotton backing.

Q. That is a perfectly clear description of what is in the coat? A. That is right.

Q. And it does not contain vicuna? A. That is right.

Q. So that no one reading that advertisement would have any doubt as to what was in that overcoat. A. That is true." (R. 214a)

With regard to the record affirmatively showing no deception if proper qualification is made, we also respectfully refer the court to the testimony of Commission's witnesses Mushmore (R. 170a), Ballenger (R. 173a), West (R. 181a), Hardy (R. 184a), Ford (R. 255-6a), Test (R. 266-267a).

It is clear that the evidence below rested at the point, that "Alpacuna" if *unexplained* was allegedly deceptive to a substantial portion of the purchasing public. It is also evident that the record is without substantial evidence, in fact without any evidence at all, that "Alpacuna", when properly modified, is not deceptive. It is equally clear that the qualifying language "Contains No Vicuna", as offered herein, would completely eradicate any misapprehension of the consumer and any deception to the public. Thus, since the proposed labels clearly vitiate any danger of public deception in the future, the order prohibiting the use of the trade name "Alpacuna" was entirely unjustified and should be modified as herein-after suggested.

National Labor Relations Board v. Express Publishing Company, 312 U. S. 426, 437 (1941).

It is, therefore, respectfully submitted that entirely apart from any considerations as to the power of the court over the remedy, as such, the order in this case should have been modified in order to conform to the

findings of fact and the substantial evidence in the record. As it stands now that order is not based in substantial evidence.

The order should, at the very least have been modified so that it reads that the petitioner is prohibited from:

“Using the word ‘Alpacuna’ or any other word which in whole or in part is indicative of the word ‘vicuna’, without proper qualification indicating the absence of vicuna.”

Accompanying the trade name with the phrase “Contains No Vicuna” would clearly dispel any possible inference of vicuna content. In this manner, due regard for the public, on the one hand, and consideration for the preservation of a valuable property right, on the other hand, would both be satisfied. This, we submit, is the only type of order which could be properly entered in this case in view of the present state of the record.

CONCLUSION

The decree of the Circuit Court of Appeals for the Third Circuit should be reversed and the proceeding remanded to that court with a mandate to enter a modified order permitting the use of the trade name with proper qualification indicating the absence of vicuna.

Respectfully submitted,

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MARVIN J. BLOCH,
On the Brief.

SUPREME COURT OF THE UNITED STATES.

No. 605.—OCTOBER TERM, 1945.

Jacob Siegel Company, Petitioner, } On Writ of Certiorari to
vs. } the United States Circuit
Federal Trade Commission. } Court of Appeals for the
Third Circuit.

[March 25, 1946.]

Mr. Justice DOUGLAS delivered the opinion of the Court.

The alpaca and the vicuña are animals whose fleece is used in the manufacture of fabrics. The fleece of the vicuña is, indeed, one of the finest and is extremely rare; and fabrics made of it command a high price. Petitioner manufactures overcoats and topcoats and markets them under the name Alpacuna. They contain alpaca, mohair, wool, and cotton but no vicuña.

The Federal Trade Commission in proceedings under § 5 of the Federal Trade Commission Act (52 Stat. 111, 15 U. S. C. § 45) found that petitioner had made certain misrepresentations in the marketing of its coats. It found, for example, that the representations that the coats contained imported angora and guanaco were false. It also found that the name Alpacuna is deceptive and misleading to a substantial portion of the purchasing public, because it induces the erroneous belief that the coats contain vicuña. But there was no finding that petitioner had made representations that Alpacuna in fact contained vicuña. It accordingly issued a cease and desist order¹ which, among other things,

1 It ordered petitioner to cease and desist from

- "1. Representing that respondent's coats contain guanaco hair.
- "2. Representing that the Angora goat hair or mohair used in respondent's coats is imported from Turkistan or any other foreign country.
- "3. Representing through the use of drawings or pictorial representations, or in any other manner, that respondent's coats contain fibers or materials which they do not in fact contain.
- "4. Representing that coats made of fabrics which have a cotton backing are composed entirely of wool or of wool and hair.
- "5. Using any advertising matter or campaign, aiding, encouraging, or promoting the use by dealers of any advertising matter which purports to disclose the constituent fibers or materials of coats composed in part of cotton, unless such advertising matter clearly discloses such cotton content along with such other fibers or materials.
- "6. Using the word 'Alpacuna,' or any other word which in whole or in part is indicative of the word 'vicuña,' to designate or describe respondent's coats; or otherwise representing, directly or by implication, that respondent's coats contain vicuña fiber."

banned the use of the word Alpacuna to describe petitioner's coats. 36 F. T. C. 563. The Circuit Court of Appeals affirmed. 150 F. 2d 751. It held that the Commission's findings respecting the use of the name Alpacuna were supported by substantial evidence. It was of the view, however, that the prohibition of the use of the name was far too harsh; and it stated that it would have modified the order to permit Alpacuna to be used with qualifying language had it thought that *Federal Trade Commission v. Royal Milling Co.*, 288 U. S. 212, was still a controlling authority. But it concluded that that case had been so limited by subsequent decisions of the Court, involving other administrative agencies, that control of the remedy lay exclusively with the Commission. The case is here on a petition for a writ of certiorari which we granted because of the importance of the question presented.

By the Federal Trade Commission Act Congress made unlawful "unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce." § 5(a). It provided that when the Commission's cease and desist orders were challenged in the courts, the findings of the Commission "as to the facts, if supported by evidence, shall be conclusive." § 5(c). But it did not limit the reviewing court to an affirmance or reversal of the Commission's order. It gave the court power to modify the order as well.²

The power to modify extends to the remedy as *Federal Trade Commission v. Royal Milling Co.*, *supra*, indicates. In that case, the Commission barred the use of the words "milling company" since the company, though blending and mixing flour, did not manufacture it. The Court concluded that a less drastic order was adequate for the evil at hand and remanded the case so that the Commission might add appropriate qualifying words which would eliminate any deception lurking in the trade name. On the other hand, the excision of a part of the trade name was sustained in *Federal Trade Commission v. Algoma Lumber Co.*, 291 U. S. 67. In that case, "California white pine" was being used to describe what was botanically a yellow pine. The Commission prohibited the use of the word "white" in conjunction with "pine" to describe the product. The Court sustained the order.

² See, 5(c) provides that the court "shall have power to make and enter upon the pleadings, evidence, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the Commission, and enforcing the same to the extent that such order is affirmed"

The Commission has wide discretion in its choice³ of a remedy deemed adequate to cope with the unlawful practices in this area of trade and commerce. Here, as in the case of orders of other administrative agencies under comparable statutes,⁴ judicial review is limited. It extends no further than to ascertain whether the Commission made an allowable judgment in its choice of the remedy. As applied to this particular type of case, it is whether the Commission abused its discretion in concluding that no change "short of the excision" of the trade name would give adequate protection. *Federal Trade Commission v. Algoma Lumber Co.*, *supra*, pp. 81-82. The issue is stated that way for the reason that we are dealing here with trade names which, as *Federal Trade Commission v. Royal Milling Co.*, *supra*, p. 217, emphasizes, are valuable business assets. The fact that they were adopted without fraudulent design or were registered as trade-marks does not stay the Commission's hand. *Federal Trade Commission v. Algoma Lumber Co.*, *supra*, p. 79; *Charles of the Ritz Distributors Corp. v. Federal Trade Commission*, 143 F. 2d 676, 679. But the policy of the law to protect them as assets of a business indicates that their destruction "should not be ordered if less drastic means will accomplish the same result." *Federal Trade Commission v. Royal Milling Co.*, *supra*, p. 217. The problem is to ascertain whether that policy and the other policy of preventing unfair or deceptive trade practices can be accommodated. That is a question initially and primarily for the Commission. Congress has entrusted it with the administration of the Act and has left the courts with only limited powers of review. The Commission is the expert body to determine what remedy is necessary to eliminate the unfair or deceptive trade practices which have been disclosed. It has wide latitude for judgment and the courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist.

But in the present case, we do not reach the question whether the Commission would be warranted in holding that no qualifying

³ See *International Association of Machinists v. National Labor Relations Board*, 311 U. S. 72, 82; *Phelps Dodge Corp. v. National Labor Relations Board*, 313 U. S. 177, 194; *Virginia Electric Co. v. National Labor Relations Board*, 319 U. S. 533, 543; *Franks Bros. Co. v. National Labor Relations Board*, 321 U. S. 702, 704-705; *Board of Trade v. United States*, 314 U. S. 504, 548; *Federal Security Adm'r v. Quaker Oats Co.*, 318 U. S. 218, 227, 229; *Northwestern Electric Co. v. Federal Power Commission*, 321 U. S. 110, 123-124.

language⁴ would eliminate the deception which it found lurking in the word Alpacuna. For the Commission seems not to have considered whether in that way the ends of the Act could be satisfied and the trade name at the same time saved.⁵ We find no indication that the Commission considered the possibility of such an accommodation. It indicated that prohibition of the use of the name was in the public interest since the cease and desist order prohibited the further use of the name.⁶ But we are left in the dark whether some change of name short of excision would in the judgment of the Commission be adequate. Yet that is the test, as the *Algoma Lumber Co.* and the *Royal Milling Co.* cases indicate. Its application involves the exercise of an informed, expert judgment. The Commission is entitled not only to appraise the facts of the particular case and the dangers of the marketing methods employed (*Federal Trade Commission v. Winsted-Hosmer Co.*, 258 U. S. 483, 494) but to draw from its generalized experience. See *Republic Aviation Corp. v. National Labor Relations Board*, 324 U. S. 793, 801-805. Its expert opinion is entitled to great weight in the reviewing courts. But the courts are not ready to pass on the question whether the limits of discretion have been exceeded in the choice of the remedy until the administrative determination is first made.

The judgment is reversed and the cause is remanded to the Circuit Court of Appeals for further proceedings in conformity with this opinion.

Reversed.

Mr. Justice JACKSON took no part in the consideration or decision of this case.

⁴ Petitioner now uses labels reading "Alpacuna Coat - contains no vicuña" and specifies the fibre content of the cloth. See 54 Stat. 1128, 15 U. S. C. 108.

⁵ The opinion of the Commission goes no further than to find that "the name 'Alpacuna' is misleading and deceptive to a substantial portion of the purchasing public in that it represents or implies" that the coats contain vicuña; and that as a result substantial trade is diverted to respondent from its competitors.

⁶ This appears not from the opinion but from the paragraph following the order entered by the Commission:

"Commissioner Freer dissents from so much of the order as wholly prohibits the continued use of the trade name 'Alpacuna' for the reason that this trade name, which has been in use for more than thirteen years, is a valuable business asset, and is neither deceptive per se, nor is the testimony concerning its tendency or capacity to deceive sufficiently clear and convincing as to render such prohibition of its use necessary in the public interest.

"A majority of the Commission do not agree with either Commissioner Freer's statements of fact or his conclusions of law."